

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 16, 2008 Session

**KENDALL JAEGER v. CIVIL SERVICE COMMISSION OF THE  
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON  
COUNTY, TENNESSEE**

**Appeal from the Chancery Court for Davidson County  
No. 06-132-III Ellen Lyle, Chancellor**

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**No. M2007-02451-COA-R3-CV - Filed February 2, 2009**

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Civil Service Employee challenged the removal of his name from a promotional eligibility list. Employee was fifth on the list when he resigned from civil service employment. Civil service policy was to remove an employee's name from the relevant promotional eligibility list upon his or her departure from civil service employment, except in the case of lay offs; however, due to human error Employee's name was not removed from the list. Employee subsequently returned to civil service employment and was told that he would be promoted from the promotional eligibility list upon the successful completion of a six-month probationary period. At the end of that period, Employee was told he would not be promoted because his name should not have remained on the list after he resigned. Employee filed a grievance and upon an administrative review by a Civil Service Commissioner, the Metropolitan Government was ordered to reinstate Employee to the promotional eligibility list at issue. A review by the full Civil Service Commission reversed the order of the Commissioner. Employee appealed to the Chancery Court for Davidson County which held that while Civil Service policy did not require Employee's name to be removed, the case was moot because the promotional eligibility list at issue had expired. Finding no error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

P. Brocklin Parks and Bryan Stephenson, Nashville, Tennessee, for the appellant, Kendall Jaeger.

Sue B. Cain, J. Brooks Fox, and Elizabeth A. Sanders, Nashville, Tennessee, for the appellee, Civil Service Commission of the Metropolitan Government of Nashville and Davidson County, Tennessee.

## OPINION

The Plaintiff, Kendall Jaeger, joined the Metro Nashville Police Department as a police officer in 1993. In 2003, Officer Jaeger took a sergeant's exam and, based on his score, was placed fifth on the promotional eligibility list. The promotional eligibility list at issue was first certified, or effective, January 16, 2004, and it expired on January 16, 2006.<sup>1</sup> On June 16, 2004, Officer Jaeger resigned from the Metro Police Department for personal reasons. When he resigned Officer Jaeger did not anticipate that he would return.<sup>2</sup> In September 2004, Officer Jaeger decided to return to Nashville and approached the police department about returning to the department. The police department welcomed Officer Jaeger back. Officer Jaeger stated at the hearing before the Civil Service Commission that upon his return, he did not expect to be promoted to sergeant, but that he did hold the expectation that he would retain the same placement on the promotional eligibility list.

On Wednesday September 29, 2004, the Metro Police Department asked Metro Human Resources for the current sergeant promotional eligibility list in order to fill several vacancies. Metro Human Resources Analyst David Sinor testified that the police department had asked for the eligibility list to be printed and sent immediately. Mr. Sinor testified that he told his contact at the police department that normally human resources does a secondary check, once asked for the list, which would take approximately three to four hours to complete.<sup>3</sup> Mr. Sinor testified that the person with whom he spoke at the police department told him that "the chief was in a meeting right now; he was meeting to decide who to promote and that he needed it within the next ten minutes." Mr. Sinor checked with his supervisor, who told him to go ahead and fax the eligibility list to the police

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<sup>1</sup> Promotional eligibility lists are effective for two years, though they can be extended for one additional year. Sergeant exams are only given when a vacancy occurs and there is no promotional eligibility list in effect. While a promotional eligibility list is effective, if a vacancy occurs, an officer will be promoted from that list according to his rank on the list.

<sup>2</sup> Upon leaving the department, Officer Jaeger moved to Pennsylvania to be with his wife who apparently moved to that state because of child custody arrangements.

<sup>3</sup> The process for certifying a promotional eligibility list, regardless of department, involves Metro Human Resources personnel manually checking each name on the list against payroll records to verify that each person continues to be employed by the Metropolitan Government. In the past, this check was done automatically because the payroll system communicated electronically with human resources' tracking system for promotional eligibility lists. Under the old system, as a person's status changed in the payroll system, his or her name would automatically be removed by the computer system and would no longer appear on the eligibility list, or Register of Eligibles. At some point prior to this case, the Metropolitan Government changed payroll systems and, according to Mr. Sinor, "we're not allowed to update our tracking system from it. And it became a manual process." After a promotional exam is given and a promotional eligibility list is first created, Metro Human Resources does an initial check to make sure every person on the list is on the Metro payroll. While a list is effective, Metro Human Resources staff review the minutes of each Civil Service Commission meeting and remove names that appear in the minutes as terminations from their respective promotional register. Normally, when a department asks for their promotional eligibility list in order to make promotions, human resources does another check, or re-certification, of the list against the current payroll information before sending the list to the department.

department and that human resources would complete their checks the following workday to make sure everything was alright with the list. In an email sent to all police personnel at 1:42 P.M. on the same day, Metro Police Chief Ronal Serpas informed the department of the promotions effective October 1, 2004. Officer Jaeger's name appeared on that list as being promoted to the rank of sergeant.

On Thursday September 30, 2004, Officer Jaeger signed a conditional offer of employment which stated that his employment was contingent on his successful completion of a psychological exam, a polygraph exam, a medical exam and drug screening as well as a probationary period. Officer Jaeger subsequently completed these requirements successfully. The conditional offer of employment also stated that Officer Jaeger was returning to the department in the position of Police Officer 2, the rank he had attained before his departure. When Officer Jaeger signed his conditional offer of employment he was told that he had been promoted to sergeant and that after completing the six-month probationary period he would receive his new assignment as sergeant.

On the same day that Officer Jaeger signed the conditional offer of employment, Metro Human Resources completed their secondary check of the sergeant promotional eligibility list and discovered that Officer Jaeger's name was still on the list despite not being on Metro's payroll. Metro Human Resources exchanged emails with the Metro Police Department asking them to void the previous list and that human resources would bring the police department a new one. When asked by the police department what policy required that Officer Jaeger's name be removed from the promotional eligibility list, Metro Human Resources said that Metropolitan Government of Nashville Civil Service Rule 2.6-1 mandated that the director of human resources remove names of employees who have left Metro employment. Civil Service Rule 2.6-1 provides in relevant part, "[n]ames may be removed from eligibility registers or lists by the Director of Human Resources for . . . [t]he separation from Civil Service employment, other than by layoff, of an eligible whose name is on a promotional register...."

Mr. Sinor testified before the Civil Service Commission that the reason Officer Jaeger's name had mistakenly been left on the list after his departure from Metro employment was because human resources' manual checking process was not "completely up-to-date." He explained that human resources personnel were approximately four to six weeks behind and because Officer Jaeger's resignation wasn't listed until the Civil Service Commission minutes of August 10, 2004, the human resources staff had not yet updated the promotional eligibility lists based on those minutes. Subsequently, on September 29, when the police department asked for the promotional eligibility list "immediately," human resources sent over the list, which still had Officer Jaeger's name on it.

On April 16, 2005, after completing the six-month probationary period successfully, Officer Jaeger was informed that he would not be promoted because his name was mistakenly left on the list after he had resigned from the department in June 2004. Officer Jaeger filed a grievance with the Metro Civil Service Commission and on July 27, 2005, a hearing was held before Commissioner Jarrett, who determined that Civil Service Rule 2.6-1 did not mandate that human resources remove

the names of such employees from the list, but rather that it gives discretion to do so. Commissioner Jarrett's order stated:

[t]he cited rule specifically states 'may', which is permissive, and not 'shall or will', which is mandatory. Whether this action was oversight or intentional by the Assistant HR Director, it is unfair to Officer Jaeger to deny him appropriate ranking on this promotional list through no fault of his own.

After a hearing before the full Civil Service Commission, the Commission reversed Commissioner Jarrett's Initial Order and ordered Officer Jaeger's name "shall remain removed from the current Police Sergeant promotional eligibility list, in accordance with Civil Service Rule 2.6-1."

Officer Jaeger appealed the Commission's decision to Davidson County Chancery Court, which found that Metro's decision to remove Officer Jaeger's name from the eligibility list was made upon unlawful procedure in violation of Tenn. Code Ann. § 4-5-322(h). Specifically, the Chancery Court found that the word "may" in Civil Service Rule 2.6-1 did not mandate removal of the names of employees who had left Metro employment as Metro claimed, but rather it gave the department discretion. Despite concluding that the Commission's decision was reversible, the Chancery Court declined to reverse and instead dismissed the case for lack of jurisdiction. The court explained that "[n]o live controversy exists in the case because the relief sought by [Officer Jaeger] – having his name reinstated to the promotional eligibility list on which his name previously appeared – cannot be granted since the list has expired."

On appeal, Officer Jaeger asks this Court to affirm the Chancery Court's determination that the Commission committed reversible error, but to find the Chancery Court erred in finding the issue moot.

## **Analysis**

### **I. Standard of Review**

The scope of this Court's review of the decision of the Commission is the same as the trial court's and is set out at Tenn. Code Ann. § 27-9-114(b)(1):

(b)(1) Judicial review of decisions by civil service boards of a county or municipality which affects the employment status of a county or city civil service employee shall be in conformity with the judicial review standards under the Uniform Administrative Procedures Act, § 4-5-322.

The relevant portion of the Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. § 4-5-322(h), provides:

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion....

*See also Williams v. Metropolitan Police Dept.*, No. M2005-00937-COA-R3-CV, 2007 WL 1296884 at \* 3 (Tenn. Ct. App. May 02, 2007); *Gleaves v. Shelby County*, No. W2007-02259-COA-R3-CV, 2008 WL 4648354 at \* 5 (Tenn. Ct. App. October 21, 2008).

Construction of statutes and application of law to facts are questions of law that may be addressed by courts on review of agency's decision under the UAPA. *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *See Beare Co. v. Tennessee Dept. of Revenue*, 858 S.W.2d 906 (Tenn. 1993). The issues before this Court – the interpretation of Civil Service Rule 2.6-1 and whether there is a live controversy – involve the construction of administrative policies and application of law to facts, therefore, we apply a *de novo* standard of review, with no presumption of correctness, or deference to the Commission's decision. *H & R Block Eastern Tax Services, Inc.*, No. M2007-00656-COA-R3-CV, 2008 WL 269514 at \*5.

## **II. Mootness**

Officer Jaeger contends that the trial court erred in finding that there is no longer a live controversy rendering Officer Jaeger's appeal moot. Officer Jaeger offers two alternative theories under which this court should find that his appeal is not moot. Officer Jaeger contends that the case is not moot because the Chancery Court had the authority to order the promotion of Officer Jaeger to sergeant thereby providing meaningful relief from a judgment in his favor. Alternatively, Officer Jaeger contends that even if this Court finds that the case is moot, that the exceptions to the mootness doctrine apply to his case.

In order for a court to rule on a matter, the case must remain justiciable throughout the entire course of litigation, including appeal. *Alliance for Native American Indian Rights in Tennessee, Inc. v. Nicely et al.*, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005); *State v. Ely*, 48 S.W.3d 710, 716, n.3 (Tenn. 2001). A case is not justiciable if it does not involve a genuine, continuing controversy requiring the adjudication of presently existing rights. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998).

A moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *County of Shelby v. McWhorter*, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d at 616. An appellate court will dismiss an appeal as moot when ‘by a court decision, acts of parties, or other causes occurring after the commencement of the action the case has lost its controversial character.’” *West v. Vought Aircraft Industries, Inc.*, 256 S.W.3d 618, 625 (Tenn. 2008)(citing *McCanless v. Klein*, 188 S.W.2d 745, 747 (Tenn. 1945)). Determining whether a case is moot is a question law. *Alliance for Native American Indian Rights in Tennessee, Inc.*, 182 S.W.3d at 339; *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n*, No. M1998-00985-COA-R3-CV, 2001 WL 72342, at \*5 (Tenn. Ct. App. Jan. 30, 2001); *Orlando Residence, Ltd. v. Nashville Lodging Co.*, No. M1999-00943-COA-R3-CV, 1999 WL 1040544, at \*3 (Tenn. Ct. App. Nov.17, 1999) (No Tenn. R. App. P. 11 application filed).

The trial court found Officer Jaeger’s case was moot because “[n]o live controversy exists in the case because the relief sought by [Officer Jaeger] – having his name reinstated to the promotional eligibility list on which his name previously appeared – cannot be granted since the list has expired. The trial court found that the list on which Officer Jaeger’s name previously appeared expired on January 16, 2006, and that no new list had been drafted; consequently, “[b]ecause the list at issue no longer exists, this Court is unable to grant the relief requested, and the case is, therefore moot.” The trial court explained that it was unable to put Officer Jaeger’s name on a new or subsequently created list in the same position that it was previously or order that he be promoted at the next sergeant opening because such action “would not return things to status quo.” The trial court explained:

To do so, this Court would have to pass over other qualified and deserving candidates who may score higher than [Officer Jaeger] on the exam or who may be next in line for promotions. That would be prejudicial to those employees and cause a change in their circumstances.

Officer Jaeger contends that the case is not moot because Officer Jaeger would have been provided “meaningful relief” if the trial court had ordered that he be promoted to sergeant. Officer Jaeger contends that he did ask for such relief despite the trial court’s statement to the contrary. In his Brief in Opposition to Denial of Promotion of Kendall Jaeger submitted to the trial court Officer Jaeger asked the trial court to reverse the Commission’s decision and to reinstate Officer Jaeger onto the Register of Eligibles and that he be promoted according to his previous ranking as ordered in the Initial Order of Commissioner Jarrett.

In a thorough analysis, the trial court found that the case was moot because the promotional eligibility list from which Officer Jaeger’s name was removed no longer exists. Moreover, the trial court noted that no new list has been created and to put Officer Jaeger on a future list or promote him directly to sergeant would be fundamentally unfair and prejudicial to other qualified and deserving

candidates who may be next in line for promotions and cause a change in those employees' circumstances. We agree. The record shows that Officer Jaeger did not have the expectation upon resuming employment with the police department that he would be promoted and, despite being told that he would be promoted at the end of his probationary period, he was never actually promoted to the rank of sergeant nor did he ever serve in the position of sergeant. The eligibility list from which Officer Jaeger's name was removed expired during the course of litigation without any attempt by Officer Jaeger to stay enforcement of the removal of his name from the list or attempt to extend the effectiveness of the list. There is nothing in the record to indicate that if we ordered Officer Jaeger to be promoted to sergeant that any such position exists or would be available. We agree with the trial court's conclusion that the courts can offer Officer Jaeger no meaningful relief since the promotional eligibility list at issue has expired and no future list or direct promotion would return things to the status quo without causing fundamental unfairness to many other qualified promotional candidates; consequently, this case is moot.

### *Exceptions to the Mootness Doctrine*

Tennessee courts have recognized two exceptions in cases where the questions are otherwise moot. *LaRouche v. Crowell*, 709 S.W.2d 585, 587 (Tenn. Ct. App. 1985). "The object sought by affording review in a case otherwise moot, is a clarification of the law that will settle some dispute that is likely to arise in the future." *LaRouche*, 709 S.W.2d at 588. Where a case on appeal is determined to be moot and does not fit into one of the recognized exceptions to the mootness doctrine, the appellate court will ordinarily vacate the judgment below and remand the case to the trial court with directions that it be dismissed. *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d at 617; *McIntyre v. Traughber*, 884 S.W.2d 134, 138 (Tenn. Ct. App. 1994). However, if the case falls within one of the recognized exceptions to the mootness doctrine, the appellate court has the discretion to reach the merits of the appeal in spite of the fact that the case has become moot. *Alliance for Native American Indian Rights in Tennessee, Inc.*, 182 S.W.3d at 339.

The first exception occurs in a case which involves a matter of "great public interest." *LaRouche*, 709 S.W.2d at 587; see *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972). In *New Riviera Arts Theatre v. State*, 219 Tenn. 652, 412 S.W.2d 890 (1967), the rule is defined in the following terms:

While the rule that this Court will not decide a moot question is applicable when the question for determination affects only rights and claims personal to the parties, an exception is well recognized when interest of a public character and of importance in the administration of justice generally are involved. *McCanless v. Klein*, 182 Tenn. 631, 188 S.W.2d 745 (1945). Because the question involves a determination of public rights or interests under the conditions which may be repeated in the future, we will consider the question.

*New Riviera Arts Theatre*, 219 Tenn. at 658, 412 S.W.2d at 893.

The second exception applies when an issue is capable of repetition but evades review if not addressed by the courts. *LaRouche*, 709 S.W.2d at 588; see *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 782 (Tenn. 1980); *Perry v. Banks*, 521 S.W.2d 549 (Tenn. 1975). “Parties requesting a court to invoke the exception must demonstrate 1) a reasonable expectation that the official acts that caused the current litigation will re-occur, 2) a risk that an effective remedy cannot be provided if the events re-occur, and 3) that the same complaining party will again be prejudiced by the official acts.” *Alliance for Native American Indian Rights in Tennessee Inc.*, 182 S.W.3d at 340. A mere theoretical possibility that an act might re-occur is not sufficient to invoke the “capable of repetition yet evading review” exception. Rather, “there must be a ‘reasonable expectation’ or a ‘demonstrated probability’ that the same controversy will recur involving the same complaining party.” *Id.* (citing *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1184, 71 L.Ed.2d 353 (1982)); see Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 2.13, at 37 (3d ed. Supp. 2005).

The trial court found that neither exception to the mootness doctrine applied here. The trial court found that the first exception did not apply because the issues in the present case affect only the personal rights and claims of Officer Jaeger and “do not involve matters of great public concern” as required by *LaRouche*. The court in *LaRouche* acknowledged that the public interest exception allows courts to rule on moot questions where the issues involved are important to the public interest and the administration of justice, but found that the exception did not apply to the issue of that case – whether a candidate should have been put on the ballot. *LaRouche*, 709 S.W.2d at 587. In so holding, the *LaRouche* court stated, “[i]t is true that the right to vote is one of the most valuable rights secured by our constitution, but this case is about the rights of Mr. LaRouche, an individual. It does not affect a large segment of the voting public.” *Id.* at 587-588.

Officer Jaeger contends that a court’s finding that the expiration of a promotional eligibility list renders an employment case moot would have broad public interest implications because of the widespread use of promotional eligibility lists in city, county and state government. Specifically, Officer Jaeger suggests that the impact of such a decision would mean that in every case where an aggrieved governmental employee sues his or her employer, whether for an alleged administrative violation, as in this case, or even for racial or gender discrimination, that protracted litigation is likely to extend beyond the life of a given list such that the relevant governmental body would have “an absolute defense of mootness.” We disagree with Officer Jaeger’s theory. The administrative and judicial review process provides several ways in which an aggrieved employee may preserve the relevant eligibility list including extending the list’s effective date as well as moving to stay removal of the aggrieved employee’s name from the list. While we recognize there are a great number of civil service employees throughout the state at all levels of government, this case, like *LaRouche*, is about the rights of an individual, Officer Jaeger, and whether or not he is promoted to police sergeant does not affect a large segment of the public.

The trial court also found that the second exception, capable of repetition yet evading review, did not apply. The trial court explained:



In order to apply that exception, [Officer Jaeger] would have to show 1) a reasonable expectation that the official acts that caused the current litigation will re-occur, 2) a risk that an effective remedy cannot be provided if the events re-occur, and 3) that the same complaining party will again be prejudiced by the official acts. *Alliance for Native American Indian Rights in Tennessee Inc., et al., v. Nicely*, 182 S.W.3d 333, 340 (Tenn. Ct. App. 2005). Assuming [Officer Jaeger] could demonstrate a reasonable expectation that Metro will continue to interpret the policy as being mandatory, thereby prejudicing other employees, it is unlikely he could prove the last two requirements. There is no risk that an effective remedy will not be possible if the matter arises again. As previously stated, the eligibility lists can last up to three years. Arguably, that is sufficient time for the court to decide the matter and grant relief. If not, the prejudiced party could request a stay under Tenn. Code Ann. § 4-5-322(c). This would allow a court to stay enforcement of a decision to remove a name from a list. Also, it is highly unlikely that [Officer Jaeger] would again be prejudiced by the same official acts.

Officer Jaeger contends that the present case falls within the second exception because there are likely to be other aggrieved employees of a city, county or the State, which use promotional eligibility lists who pursue their claims through the administrative and judicial review processes, which can often span years, and who find that by the time their issue reaches judicial review the underlying promotional list may have expired. We do not find that Officer Jaeger has met his burden with regard to the elements required to satisfy the second exception. The record does not show that there is a reasonable expectation that the official acts that caused the current litigation will re-occur; in fact, the record indicates that in the last twenty years there has only been one other similar mistake by Metro Human Resources. We also do not find that there is a risk that an effective remedy cannot be provided if the events re-occur. As the trial court noted, the eligibility lists can last up to three years, which is arguably sufficient time for the administrative and judicial process to decide the matter and grant relief; in any event, the aggrieved employee can request a court to stay enforcement of a decision to remove a name from a list. Finally, Officer Jaeger fails to demonstrate the third required element – that the same complaining party will again be prejudiced by the official acts. We agree with the trial court that the unique set of circumstances that would have to occur in order for Officer Jaeger to again find himself prejudiced by the same official acts is highly unlikely.

We affirm the trial court's determination that the present case is moot and does not fall within either of the exceptions to the mootness doctrine. Because we find the case moot, we do not reach the merits of the issue regarding the correct interpretation of Civil Service Rule 2.6-1.

### **Conclusion**

For the foregoing reasons, the judgment of the trial court is affirmed. The case is remanded to the trial court for the collection of costs accrued.

Costs are assessed to Kendall Jaeger, for which execution may issue, if necessary.

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RICHARD H. DINKINS, JUDGE